

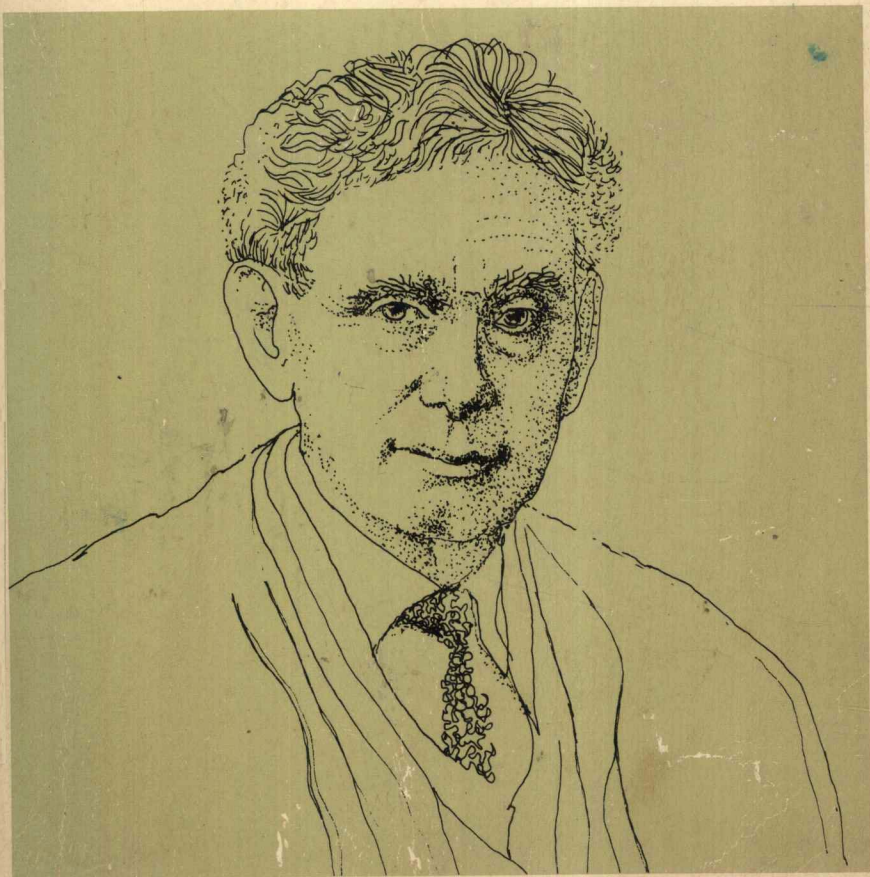


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Melvin I. Urofsky

Louis D. Brandeis

and the Progressive Tradition



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and the
Progressive Tradition



Edited by Oscar Handlin

Little, Brown and Company · Boston · Toronto

for Sharyn

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Editor's Preface

THE SEVERAL careers of Louis D. Brandeis spanned a perilous transition in the life of the American people. In the years between his birth and his death a rural society became urban. Industry displaced agriculture as the basis of the country's wealth. A massive wage labor force in manufacturing differed in character and in ethnic origin from the farmers and artisans who had earlier composed the bulk of the population. The effects of these developments rippled outward to reorient municipal, state, and national politics, and in a way of which few were conscious transformed the practice of law.

The social, economic, and political issues raised by these changes troubled many citizens. But men and women accustomed to growth as a constant of their history did not surrender their traditional optimism. A firm belief in progress persuaded them that humanity was capable of indefinite improvement, and a variety of movements took form to achieve that end. After 1900, they became known collectively as progressives. Although the progressives never formed a homogeneous party subscribing to a uniform platform, they shared intellectual features. They insisted that policy had to rest on knowledge and on the use of rational methods, and

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I

Beginnings

LOUIS DEMBITZ BRANDEIS's life spanned nearly a century of this country's history. Born in Louisville, Kentucky, four years before the Civil War, on November 13, 1856, he died on the eve of World War II, on October 5, 1941. During his eighty-five years the United States grew from a provincial agrarian country into a mighty industrialized giant with global interests and responsibilities. Through Civil War and Reconstruction, through Greenbacker and Populist and Progressive unrest, through Square Deal and New Freedom and New Deal, through boom and bust, Brandeis clung to a belief in essential, immutable values. Despite the dizzying pace of change, his vision of what constituted a good society remained intact. He was not blind to events and developments in the world nor afraid of change per se. The quality of life, its opportunities, its challenges, its moral tone, mattered greatly to him, and he spent his talents and energy attempting to preserve the democratic, open nature of the society he knew and cherished as a youth.

Louisville in the 1850s and 1860s was hardly a frontier society, nor were the Brandeises pioneering in an uncharted wilderness. The city's strategic position on the Ohio River made it a natural center for the region's commerce, a situation that had drawn Adolph and Frederika Brandeis there after their emigration from Bohemia in the wake of the 1848 revolutions. Although not involved in the political struggle, the Brandeis family had been touched by the liberals' vision;

they and a number of their relatives decided to seek a freer life in the New World. Reasonably well educated and cultured, they soon prospered as Adolph's grain business expanded in the boom years of war and reconstruction. They also played an active role in the German-speaking community, which was attempting to re-create the literary and artistic life many had known in the old country. Musicales, debating societies, literary clubs, good talk and plenty of it were part of the milieu in which young Louis grew up.

Equally important to the family was a basic and deep-felt love of America and a commitment to democracy. Although the Brandeises cherished much about Europe and its culture, they remembered its political despotism as well. Young Louis received a taste of this at first hand when his father, anticipating the depression of 1873, closed his business and took the family on an extended visit back to Europe. There Brandeis enrolled in the Annen-Realschule in Dresden. His grades during the two years he attended the school were excellent, and he won a prize in 1875 "for industry and good behavior." Moreover, the academic rigor of the German school taught him how to think methodically, how to use experience and knowledge to develop new ideas. But the strict paternalism and authoritarian rules repelled him. One evening he returned late to find himself locked out, and he had to whistle to awaken his roommate in order to open the door. For this offense the headmaster severely reprimanded him. The experience left the young democrat homesick. "In Kentucky you could whistle! I wanted to go back to America." In the spring of 1875 he got his wish, and the family returned to begin rebuilding its fortunes. That fall Louis Brandeis entered the Harvard Law School.

The study of law was then in transition. Instead of reading in a lawyer's office, a form of apprenticeship, more and more young men were enrolling in law schools. At Harvard Christopher Columbus Langdell spearheaded a major revolution in legal training with the case method of study. Langdell believed that essential legal doctrines could best be understood

through a rigorous examination of the cases in which they had developed. Although some lawyers and teachers looked askance at the new pedagogy, Brandeis embraced it enthusiastically. "When the end of the chapter of cases is reached, the student stands possessed of the principles in their full development. Having attended as it were at their birth, having traced their history from stage to stage, the student has grown with them and in them. . . . Once acquired, they cannot be forgotten; for they are a part of himself."

The years at Harvard were happy; Louis excelled in his studies, and his love of the law deepened. To his cousin Otto Wehle he wrote: "You have undoubtedly heard from others of my work here, how well I am pleased with everything that pertains to the law, yet my own inclination would prompt me to repeat the same to you, though at the risk of great reiteration. My thoughts are almost entirely occupied by the law. . . . Law schools are splendid institutions." About the only difficulty Brandeis faced involved recurrent eye problems, and he feared for a while that he might have to give up his cherished dream of becoming a lawyer. Ultimately a noted New York doctor found nothing wrong other than severe strain induced by long hours of reading in the flickering light of a gas lamp and advised that "it won't hurt you to read less and think more." As a result Brandeis worked hard to develop his already impressive retentive powers. In later years he would amaze both friend and foe with his phenomenal memory, which seemingly retained everything he had ever learned about a case or an issue.

In his two years of regular study as well as a year of postgraduate work, Brandeis compiled a nearly perfect academic record, impressing all whom he met with his knowledge of the law as well as his ability to think logically. After graduation his parents wanted him to settle in Louisville, but his favorite sister Fanny and her husband Charles Nagel persuaded him to join them in St. Louis. His year of practice there, however, proved unrewarding, and he found the intellectual climate of the city dull after the excitement of Cam-

bridge. When a classmate, Samuel D. Warren, proposed a partnership in Boston, the young Brandeis jumped at the opportunity. In July 1879 the firm of Warren & Brandeis opened its doors at 60 Devonshire Street.

The firm prospered almost at once. Warren's extensive social connections, as well as his family's paper business, attracted clients, and the abilities of the two attorneys held them. Former teachers at the law school also sent business their way, and firms from outside the Boston area began contracting with the office to represent their clients in local matters. Brandeis's legal abilities, both in written briefs and in oral presentations, were soon widely acknowledged. Chief Justice Horace Gray of the Supreme Judicial Court of Massachusetts, for whom Brandeis also served as a clerk, considered him "the most ingenious and most original lawyer I ever met, and he and his partner are among the most promising law firms we have got."

Brandeis was to remember these early years in Boston as the happiest of times. His own native brilliance as well as his friendship with Warren won him easy entry into the city's social life. The late nineteenth century marked a high point in the cultural and literary life of Boston, and Brandeis's hours away from the office found him associating with the Emersons, Thayers, Delands and others whose salons were the gathering points of Brahmin intellectuals. One of his earliest friendships was with Oliver Wendell Holmes, Jr., and he frequently took supper with Holmes and his wife at the Parker House. Brandeis, in fact, arranged the endowed chair that brought Holmes for a brief period to the Harvard Law School.

But Brandeis did more than just hobnob with Boston's finest; he imbibed an entire set of values and traditions, making them his own to the point where his law partner characterized him as "more Brahmin than the Brahmins." In the 1870s and 1880s Boston still valued the reform heritage passed down from its Puritan founders. Massachusetts had been in the forefront of the antislavery movement, had pio-

neered in child labor and factory laws, and in general had accepted the need for a society to protect its less fortunate, more vulnerable members; it acknowledged as a constant social value the need to improve. This impulse for reform had not come from the bottom but from the top, from an elite that took its social responsibilities seriously.

The Boston tradition included strong emphasis on self-reliance in a competitive economic environment. Granted, the weak had to be protected against predators; but success and its rewards went to those who fought for and earned them. Brandeis was no egalitarian; he did not believe in a society that reduced all people to a single level. Human beings had to strive, but they had to do so fairly, and despite the struggle they had civic obligations to fulfill. The role of citizen, with all the privileges and responsibilities the word entailed, was in Brandeis's eyes the most important a person could fill.

Ironically, Louis Brandeis's devotion to the older political tradition — with its emphasis on honesty and civic responsibility, its adherence to open and unfettered competition, even its insularity and provincialism — would bring down upon his head the wrath of those Brahmin leaders who had succumbed to the temptations of the new finance capitalism. Many State Street stalwarts would one day be embarrassed when this outsider publicly called upon them to adhere to their tradition of high ethical standards.

At the same time that he and Warren were building up their practice, Brandeis also gave serious thought to teaching. "I recognize that when the time comes," he wrote, "I shall have to decide between [teaching] and practice. . . . The law as a logical science has very great attractions for me. I see it now again by the almost ridiculous pleasure which the discovery or invention of a legal theory gives me; and I know that such a study of the law cannot be pursued by a successful practitioner."

In March 1882 the opportunity presented itself in an offer from Harvard President Charles Eliot to teach a course in

evidence the following year. Brandeis accepted with alacrity, much to the joy of his family. He proved an excellent teacher, and the law faculty offered him an assistant professorship. Despite the urgings of his parents, however, Brandeis opted for the combat of the courtroom. As he wrote to his brother: "I really long for the excitement of the contest, that is, a good prolonged one covering days or weeks. There is a certain joy in the draining exhaustion and backache of a long trial, which shorter skirmishes cannot afford." No one, especially Louis Brandeis, recognized at this time that his career as a legal educator in the broadest sense was at its beginning, not its end.

With the decision now firmly made, Brandeis threw himself into practice wholeheartedly, and the growth of Warren & Brandeis into one of the largest offices in New England was due primarily to his drive, ambition, and ability (Warren withdrew from the partnership in 1889 upon the death of his father in order to take over management of the family's paper mills). The practice was extensive, and Edward J. McClennen, who later became a partner in the firm, recalled that Brandeis at one time or another handled every kind of litigation, including some criminal cases. The Brandeis technique involved not only thorough knowledge of the law but complete mastery of the facts involved in the case. In a notebook he wrote: "Know thoroughly each fact. Don't believe client witness. Examine documents. Reason. Use imagination. . . . Far more likely to impress clients by knowledge of facts than by knowledge of law. Know not only specific case, but the whole subject. Can't otherwise know the facts. Know not only those facts which bear on direct controversy, but know all the facts and laws that surround."

Brandeis's ability to master "all the facts and laws that surround" proved to be the key to his success, for the relationship between lawyers and their business clients was then passing through a critical transformation. Previously when a businessman had gone to see a lawyer, litigation had already been decided upon; for an action that had been initiated or

completed, the client was either suing or needed defense against a suit. The lawyer acted on behalf of his client after the fact. The widespread adaptation of the corporate form, the increase of multistate and multiparty transactions, the establishment of state and federal regulations, and the growing complexity of an industrial economy made that procedure increasingly costly, not only in legal fees but in tied-up resources and delays. Gradually businessmen began to seek out lawyers before reaching decisions or initiating expensive plans. Now they needed advice and guidance on what to do to avoid legal problems. "A lawyer's chief business," said Elihu Root, "is to keep his clients out of litigation."

But to serve effectively as counsel to businessmen and corporate clients, a lawyer had to know, as Brandeis had already perceived, not only the law but the facts of the situation as well. He had to know as much about his client's business as his client did, for his advice not only touched on legal matters but affected financial decisions as well. In a letter to one of the junior members of the firm, Brandeis set out his philosophy regarding this new role of counsel: "Knowledge of the decided cases and of the rules of logic cannot alone make a great lawyer. He must know, must feel 'in his bones' the facts to which they apply — must know, too, that if they do not stand the test of such application the logical result will somehow or other be avoided. . . . When from a knowledge of the law, you pass to its application, the need of a full knowledge of men and of their affairs becomes even more apparent. The duty of a lawyer today is not that of a solver of legal conundrums; he is indeed a counselor at law. . . . Your law may be perfect, your ability to apply it great and yet you cannot be a successful advisor unless your advice is followed; it will not be followed unless you can satisfy your clients, unless you impress them with your superior knowledge and that you cannot do unless you know their affairs better than they because you see them from a fullness of knowledge."

Brandeis practiced what he preached. He impressed his

clients not only with his legal abilities but with his comprehensive understanding of the business world and of their affairs. His conduct of his own practice also left little doubt in clients' minds as to his businesslike approach. His office was sparsely furnished, and in the winter the temperature was set so low that visitors had to keep on their overcoats. One did not chat at leisure with Louis Brandeis; one presented the problem, and Brandeis probed the matter, frequently getting to the heart of a seemingly complicated issue in a matter of moments. Then the client could escape to a more hospitable clime while Brandeis and his associates followed up with research, analysis, and if necessary, litigation.

Perhaps the best-known example of Brandeis's work as counsel occurred when William H. McElwain sought advice on labor problems in his large shoe manufacturing company. Times were not so good, McElwain explained, and he wanted his workers to accept a pay cut; when business conditions had been better, he had paid a very high wage, and now an adjustment was in order. By steady questioning, however, Brandeis soon found out that nearly every worker, through no fault of his own, suffered long layoffs during slack periods. The high wages for days worked when combined with the absence of income during enforced idleness yielded a miserably low annual wage.

To remedy this situation, Brandeis suggested that McElwain reorganize his business, putting it on a more rational basis by securing his orders well in advance. He could then run his factory on a regular schedule, spacing orders to fill in previously slack times. The workers could thereby accept a cut in hourly rates because they would be working many more days during the year, thus earning a higher annual income. McElwain accepted the advice, to the benefit of his employees as well as his stockholders. Brandeis's contribution lay, as he had written to Dunbar, in learning more about the shoe business than the manufacturer had and then being able to put together a plan that resolved the problem without resorting either to a confrontation with the workers or litigation.

The method worked. Filene Department Store, Carter Ink Company, McElwain Shoe Manufacturers, and other major firms sought out his services and paid handsomely for them. In 1890 when three-fourths of the country's attorneys made less than \$5,000 annually, Brandeis earned over \$50,000. By 1907 he had made his first million, and he would have his second before he moved to the United States Supreme Court in 1916.

From nearly the day he and Sam Warren had opened their doors, they had kept busy, and the success of the firm led to its enlargement and later, under Brandeis's management, to a substantial reorganization. Each year Warren & Brandeis brought in a few top graduates of the Harvard Law School to work in the office. Some stayed only a year or two to learn their trade and then opened their own successful practices. Others, like William H. Dunbar, George R. Nutter, and Edward F. McClennen, stayed on, ultimately becoming partners. As the office and its business expanded, Brandeis began to delegate much of the work to subordinates. He took younger men, gave them exceptional opportunities, and credited them for their efforts. But the firm in many ways resembled the other large law factories of the time, and Brandeis, who later would become an arch foe of bigness, staunchly defended the size and organization of his own firm, arguing that large offices allowed each man to find his own strength and to specialize in the areas he could handle best.

During this active period as an attorney, Brandeis developed a life-style that would characterize the rest of his years. As a youth he had been physically weak, and all his life he attempted to sustain his health by regular exercise. He rode frequently, but his favorite activity was canoeing, in which he excelled. He also learned to pace himself, and he took time off for a vacation, no matter how brief, whenever he felt that his intellectual outlook was dulled. "A bookkeeper can work eight or ten hours a day and perhaps twelve, year in and year out, and possibly his work may always be good (tho' I doubt it). But a man who practices law, who aspires to

the higher places of his profession, must keep his mind fresh. . . . The bow must be strung and unstrung." Eventually Brandeis developed the pattern of taking off the entire month of August. "I soon learned," he later said, "that I could do twelve months' work in eleven months, but not in twelve." In August Brandeis left work to hike in the wilderness, to sail and canoe, and to catch up on his reading.

After 1891 his vacation time was spent with a family. Long a bachelor, Louis at last succumbed to the charms of his cousin, Alice Goldmark. In her he found a devotion to high moral principles and a love of literature and culture to match his own. They had two daughters, Susan and Elizabeth, and in their home they re-created the close-knit warmth and unity each had known in their youth. With his large income the Brandeis family could have lived extremely comfortably, affording a large house, several servants, and many luxuries. But in the words of Matthew Arnold, which both knew and cherished, "Life is not a having and a getting, but a being and a becoming." Louis and Alice Brandeis resolved to be free. By this they meant not only freedom from financial straits but freedom to do the things that really mattered to them, to have the time, the resources, and the independence to work as they chose, for the causes in which they truly believed. So they lived simply, almost frugally. His income easily paid for the necessities, and the bulk of it he put away in extremely conservative investments.

The lure of get-rich-quick schemes in the stock market never held any appeal for him, and he lectured his brother on the danger of speculation: "I feel very sure that people like us ought not to buy and sell stocks. We don't know much about the business — and beware of people who think they do. Prices of stocks are made, they don't grow; and their fluctuations are not due to natural causes. . . . My idea is that your situation is about like mine — namely to treat investments as a necessary Evil — indulging in the operation as rarely as possible. Buy only the thing you consider very good, and stick to it unless you have cause to doubt the wisdom of the purchase.

And when you buy, buy the thing which you think is safe, and will give you a fair return, but don't try to make your money out of investments. Make it out of your business. . . . Take in that all the risks you think it prudent to take — but risk only there."

Brandeis's later disenchantment with investment bankers, his scorn of those who lost money in stock operations, dated back to these beginnings. As in other areas, here too he adhered rigidly to his own advice. Aside from token purchases of stock in his clients' companies, a necessary gesture in order for him to participate legitimately in stockholder meetings, he limited his investments almost entirely to railroad, utility, and government bonds. Even the ownership of real property interested him hardly at all. For years he rented summer homes on Cape Cod, and he bought a house in Chatham when that became the only way he could ensure his continued privacy there.

Privacy was one of the things that mattered to him, and when that of Sam Warren was invaded by tabloid newspapers, he wished to help his friend. After Warren married Mabel Bayard, the young couple entertained extensively, and the *Saturday Evening Gazette* reported the events in lurid detail. Annoyed by the unwanted publicity, Warren and Brandeis, although no longer in partnership, researched the law on privacy. Although they found no legal remedy, they did write an article that scholars later considered the foundation for the development of the doctrine of privacy. Here again the early beginnings were not forgotten; devotion to the "right to be left alone" received eloquent restatement years later when as Mr. Justice Brandeis he vigorously protested the government's use of wiretaps in a dissenting opinion in *Olmstead v. U.S.*

Other things mattered as well. He saw himself as a lawyer, a man engaged in a profession, who stood in a position of parity with his clients. He deplored the growth of the law factories, whose sole business came from large corporations and where lawyers were barely more than hired hands, with

little respect or status. "I would rather have clients," he said, "than be somebody's lawyer." Just as those in need of legal services had the right to an attorney of their own choosing, so he believed lawyers could select those whom they wanted to represent, and he would not take on cases of dubious propriety. Because the nature of litigation often involved situations of competing rights, the Brandeis firm lost its share of suits. But Brandeis refused to serve a customer who had, in his opinion, acted improperly, and when he believed that one of his regular clients was in the wrong, he normally advised him to admit the error and settle out of court.

On a number of occasions Brandeis suggested to his clients that he might be of greater value as "counsel to the situation" rather than as an attorney for one faction or another. In such a role he attempted to strike a balance between the rights and obligations of each party and then work out a solution equitable to all. This judicial posture accurately reflected his efforts to create a new type of lawyer who could rise above partisan advocacy.

Once in a fight, however, Brandeis proved an extremely tough and durable opponent who had no qualms when going in for the kill. Like many men of quick and agile minds, he had little patience for fools and plodders, and he practically ignored the superficial socializing that occupied much time within the Boston bar. As a result he gained the reputation of a brilliant and rather ruthless lawyer, a lone wolf, something of an oddity in the upper strata of Brahmin Boston. Once after a long and bruising battle, he dismissed a lawyer dissatisfied with the outcome with a curt "Don't cry, baby." Such comments did little to endear him to his peers.

Other quirks also isolated him. Like many upper-class reformers, Brandeis had been a mugwump, bolting the Republican party in 1884 to support Grover Cleveland against James G. Blaine. He also joined the respectable Civil Service Reform Association and the Boston American Citizenship Committee. But his first real work as a reformer came in